UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA	)	
	)	Criminal No.: 3:00-CR-400-P
v.	)	
	)	Judge Jorge A. Solis
MARTIN NEWS AGENCY, INC.; and	)	
BENNETT T. MARTIN,	)	
	)	FILED: April 30, 2001
Defendants.	)	

RESPONSE OF THE UNITED STATES TO DEFENDANTS' MOTION FOR DISCLOSURE OF RECORDS OR REPORTS RELATING FACTS OR DATA UNDERLYING EXPERT OPINIONS AND INCORPORATED MEMORANDUM OF LAW

I
INTRODUCTION

The defendants have filed a *Motion for Disclosure of Records Relating Facts or Data Underlying Expert Opinions and Incorporated Memorandum of Law* ("Motion") asking this Court for an order requiring the United States to produce the facts or data underlying any expert opinions the United States intends to offer at trial. Specifically, the defendants seek: (1) materials relied upon by any expert in forming the expert's opinion, and (2) materials relating to prior cases or investigations in which the witness testified concerning the witness' area of expertise, or upon which the witness will rely in forming an opinion relevant to the witness' testimony. Motion, p. 1. The defendants assert that they are entitled to such materials before trial, based on Rule 705 of the Federal Rules of Evidence and Rule 26.2 of the Federal Rules of Criminal Procedure.

As discussed more fully below, neither the Rules of Evidence nor the Rules of Criminal

Procedure requires the United States to produce prior to the beginning of trial the facts or data underlying anticipated expert testimony. Here, however, in complying with its discovery obligations under Rule 16(a)(1)(C), the government has produced all of the underlying data from which an expert witness would testify. This makes the defendants' request moot. Accordingly, the United States requests that this Court deny the defendants' Motion for disclosure of facts or data underlying expert opinions of witnesses the United States intends to call at trial.

II
RULE 16(a)(1)(E) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE GOVERNS THE DISCOVERY OF EXPERT WITNESSES PRETRIAL

Federal Rule of Criminal Procedure 16(a)(1)(E) governs the pretrial discovery of expert witness testimony. The defendants seek through their Motion discovery of documents which they are not entitled to pretrial under Rule 16. Furthermore, the defendants state in their Motion that they previously requested in a separate motion notice of any expert witnesses and a summary of their testimony under Rule 16. The United States notes, however, that defendants have not requested Rule 16(a)(1)(E) information in a separate motion (defendant's motion for Rule 16 discovery, filed on October 25, 2000, did not contain such a request). Nevertheless, the United States will consider the within Motion for disclosure of facts or data underlying expert opinion as a request also for notice of expert witnesses and a summary of their testimony under Rule 16(a)(1)(E).

A. PRETRIAL DISCOVERY OF EXPERT TESTIMONY IS LIMITED UNDER RULE 16

Rule 16(a)(1)(E) requires the government, upon the defendants' request, to disclose a written summary of expert testimony the government intends to offer during its case-in-chief at

trial. The summary must describe the witnesses' qualifications, opinions, and the bases and reasons for those opinions.

Defendants make a broader request for information than what is discoverable under Rule 16. First, defendants seek the discovery of *any* expert witnesses, and the facts or data underlying any expert opinions that the United States intends to offer from *any* witness at trial. Rule 16, however, is limited to expert testimony that the government intends to use "during its case-in-chief at trial." Second, defendants are entitled to a *summary* which must include the bases and reasons for the expert's opinions. Rule 16 does not require the production of the actual materials relied upon by the expert.

B. THE UNITED STATES WILL COMPLY WITH RULE 16(a)(1)(E)

At this time, the United States does not intend to introduce any expert testimony in its case-in-chief. However, the United States Government is aware of its obligations under the Federal Rules of Criminal Procedure. If, at some point in time, the United States decides to introduce expert testimony in its case-in-chief, the United States will provide the defendants with the information required by Rule 16(a)(1)(E).

III

RULE 705 OF THE FEDERAL RULES OF EVIDENCE DOES NOT REQUIRE PRE-TRIAL DISCLOSURE OF FACTS OR DATA UNDERLYING EXPERT TESTIMONY

Defendants rely on Rule 705 of the Federal Rules of Evidence in support of their request for pretrial disclosure of facts or data underlying expert testimony which may be introduced at trial. However, Rule 705 does not require disclosure of facts and data underlying an expert

opinion before trial, but governs the presentation of expert testimony during trial.[1] In any event, if the government decides to call an expert witness, that witness would rely upon materials the government has already produced to defendants under Rule 16. The government does not have in its possession any other materials upon which any expert would rely in forming their opinion. Accordingly, the defendants' Motion is moot.

Finally, defendants state that they have a Sixth Amendment right to cross-examine an expert witness. The United States does not dispute this. Defendants will have an opportunity to cross-examine any expert witness the United States calls, and will have sufficient information to prepare for cross-examination and avoid unfair surprise or prejudice. See Advisory Committee's Note (1993). If the United States calls an expert, the expert will rely on documents already produced to defendants pursuant to Rule 16. Therefore, the United States requests that this Court deny defendants' Motion for facts and data underlying expert opinions.

IV
RULE 26.2 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE DOES NOT REQUIRE Pre-trial DISCLOSURE OF FACTS OR DATA UNDERLYING EXPERT TESTIMONY

Without authority, defendants rely on Rule 26.2 of the Federal Rules of Criminal Procedure as the basis for their request for the pre-trial production of "statements" of others upon which a government expert may rely in forming his opinion. Motion, pp. 2-3. However, Rule

[1]The defendants also make a vague and misplaced due process argument. The two cases offered in support of that position do not relate whatsoever to the discoverability of facts or data underlying expert opinions. First, Brady v. Maryland held that a defendant is denied due process when the prosecution suppresses evidence favorable to the accused and material to guilt or punishment. Brady v. Maryland, 373 U.S. 83 (1963). Second, Wardius v. Oregon held that the Due Process Clause of the Fourteenth Amendment "forbids enforcement of alibi rules unless reciprocal discovery rights are given to criminal defendants." Wardius v. Oregon, 412 U.S. 470, 472 (1973).

26.2 has nothing to do with expert testimony. Nor does Rule 26.2 have anything to do with the "statements" of persons other than the testifying witness. Rule 26.2 simply tracks the Jencks Act and makes discoverable the following statements made by the testifying witness:

> (1) a written statement made by the witness that is signed or otherwise adopted or approved by the witness; (2) a substantially verbatim recital of an oral statement made by the witness that is recorded contemporaneously with the making of the oral statement and that is contained in a stenographic, mechanical, electrical, or other recording or transcription thereof; or (3) a statement, however taken or recorded, or a transcription thereof, made by the witness to a grand jury.

Fed. R. Crim. P. 26.2(f)(1)-(3). Defendants offer no authority that an expert witness "adopts" or "approves" the statements of others, thereby making those other statements discoverable under Rule 26.2. Regardless, the issue is premature because the United States does not intend at this time to introduce expert testimony, and because Rule 26.2 requires production only after the witness has testified on direct examination.

V
CONCLUSION

Defendants are not entitled pre-trial to the facts or data underlying expert opinions. If the United States decides to call an expert witness, that witness would rely upon materials defendants already have pursuant to Rule 16. Accordingly, defendants Motion is moot, and the United States respectfully requests that this Court deny defendants' Motion.

Respectfully Submitted,

"/s/"

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was sent via Federal Express to the Office of the Clerk of Court on this 27th day of April, 2001. In addition, copies of the above-captioned pleading were served upon the defendants via Federal Express on this 27th day of April 2001.

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